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Supreme Court of the United States.

OCTOBER TERM, 1906.

No. 158.

HENRY F. IGLEHART AND MARY I. POLK,
APPELLANTS,

vs.

J. HOWARD IGLEHART, EXECUTOR OF THE LAST WILL AND TESTAMENT OF ANNIE E. I. ANDREWS, DECEASED.

BRIEF FOR APPELLANTS

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Supreme Court of the United States.

OCTOBER TERM, 1906.

HENRY F. IGLEHART AND MARY I. POLK, Appellants,

vs.

J. HOWARD IGLEHART, Executor, &c.

No. 158.

BRIEF FOR APPELLANTS.

This is an appeal, from a decision of the Court of Appeals for the District of Columbia, affirming a final decree passed by the Supreme Court of the District of Columbia sitting in special term as an equity court construing a will. The original bill for construction was filed by the executor against the heirs at law and next of kin of the testatrix and the Greenwood Cemetery Company.

Statement of Case.

Annie E. I. Andrews, while domiciled in the District of Columbia, died April 21, 1903, leaving a last will and testament, dated March 19, 1903, by which she attempted to dispose of her entire estate of $10,641.60, consisting of stocks and bonds estimated at $7,641.60, and real estate, in the District of Columbia, valued at $3,000 (R., 14).

By the first paragraph of her will she devised the said real estate to the Greenwood Cemetery Company, as trustee, to be held in trust for the use of her brother and his wife during their lives, or the life of either of them, provided they should keep the property in repair and pay the taxes. At their death, or upon their failure to repair or pay taxes, she directed the property to be sold and the proceeds to be invested in United States securities, the income therefrom to be used by the Greenwood Cemetery Company, as trustee, for the purpose of keeping the Andrews' cemetery lot in perpetual good order and condition (R., 5).

By the tenth paragraph she directed $5,000 to be raised out of her estate to be expended in erecting a suitable monument at the grave of her husband in Greenwood Cemetery, Brooklyn, New York (R., 6).

By the twelfth paragraph she directed that the residue of her estate be converted into cash and invested in United States securities, the income therefrom to be used by the Greenwood Cemetery Company, as trustee, together with the trust fund mentioned in the first paragraph, for the purpose of beautifying and keeping the Andrews' cemetery lot in perpetual good order and condition (R., 6).

D. F. Iglehart and Howard Iglehart were nominated as executors. D. F. Iglehart renounced the trust, and after the will was admitted to probate and record, letters testamentary were granted to J. Howard Iglehart. In the course of the executor's administration, a doubt arose in his mind as to the validity of some of the pro-

visions of the will, and so he filed a bill against the heirs at law and next of kin of the testatrix and the Greenwood Cemetery Company asking that the will be contrued and that instructions as to the distribution be given him (R., 2–4). The heirs at law and next of kin answered, attacking the validity of the dispositions contained in the first, tenth, and twelfth paragraphs of the will (R., 9–11). The Greenwood Cemetery Company answered, alleging the validity of said dispositions, and asserting that it is the owner in trust of the said real estate (R., 7–8).

By stipulation of counsel the case was heard upon the pleadings (R., 1–13) and an agreed statement of facts (R., 14).

The Equity Court decided in substance that it could not be presumed that it was against the public policy of the District of Columbia for one of its citizens to devise property to a foreign corporation, when the District of Columbia permits its own corporations organized for like purposes to take property. And as the will directed the real estate to be sold upon the death of the life tenant, or sooner, the trust did not infringe the rule against perpetuities. That as to the converted proceeds the District of Columbia was not at all interested as to whether or not a perpetuity was created. That while every State is vitally interested in the holding of real estate within its limits, it is not a matter of legal concern to any State whether personal property should accumulate in the hands of corporations in other States. The court thereupon

signed a decree holding valid the trusts and the provision for the erection of the monument, and authorized the executor to carry the same into effect (R., 15–17). The appellants, heirs at law, obtained a severance from their co-defendants and appealed to the Court of Appeals of the District of Columbia (R. 18).

That court affirmed the decree of the Supreme Court of the District of Columbia, and in its opinion stated if there were no exceptions to the general provisions against perpetuities that the dispositions made by the will would unquestionably be void, but that the laws of the District of Columbia make a clear exception to the common and the statute law so far as domestic cemetery companies are concerned; and as the laws of New York permit the Greenwood Cemetery Company to take property for perpetual uses, then the general law of comity prevailing among the various States of the Union requires the court to uphold and recognize the right of the Greenwood Cemetery Company to receive the bequests in the will. That the District of Columbia and its residents are more interested in having the rights of foreign cemetery companies to take bequests for perpetual purposes recognized than the States and their residents, and, therefore, the law of comity should be recognized even more broadly in the District than elsewhere. That the real estate was converted into personalty under directions in the will, and that the law as to perpetuities does not apply with the same strictness to personalty as to realty (R., 20–23). The said appellants have now brought the case to this Court for review.

Points and Authorities.

Both the lower courts based their decision in this case on the supposed duty of the court to recognize a foreign corporation through public policy, and although not clothed with the power they have endeavored in their judicial capacity to extend the doctrine of comity to a case not included within the statute, either expressly or inferentially. That general conditions afford enticing opportunities for the recognition of foreign corporations or that the intention of Congress would be very narrow, if they should not be recognized, is no justification for the courts' encroachment upon the field of the legislature and for doing judicially what Congress has failed to do or authorized to be done. The power to indicate a public policy by judicial declaration, which is not found in the statute, should be exercised only in clear cases and generally within limits already defined by decisions of acknowledged authority based upon rules of common law. There is no excuse for stretching that power to new or doubtful cases in any instance, but especially not in the District of Columbia, where Congress is in session several months every year and competent to indicate the public will as to every phase of supposed public policy. The court's assertion that residents of the District of Columbia are more interested than residents of the States in having foreign cemetery companies recognized is a pure supposition unwarranted by law and not established by proof. If such a condition exists, it is for Congress to relieve by appropriate statutes and not for the court to remedy by judicial legislation. Judge

Story, in the Girard will case (2 How., 127), said the court was not at liberty to look at general considerations of the supposed public interests of Pennsylvania upon the subject of public policy beyond what its laws and constitution and judicial decisions make known.

The authority (1879), Christian Union *vs.* Yount, 101 U. S., 352, cited by both lower courts to sustain their position, holds that certain privileges should be extended to foreign corporations "unless prohibited therefrom, either in their direct enactments or by their public policy, deduced from general course of legislation, or the settled adjudications of their highest courts." But in this case there is an absolute prohibition embracing real estate and personal property found in the laws of the District of Columbia. Chapter 24 of the Code, subchapter 1 on Estates, provides as follows:

> "SEC. 1023.—*Perpetuities.*—Except in the case of gifts or devises to charitable uses, every future estate, whether of freehold or leasehold, whether by way of remainder or without a precedent estate, and whether vested or contingent, shall be void in its creation which shall suspend, or may by possibility suspend, the power of absolute alienation of the property, so that there shall be no person or persons in being by whom an absolute fee in the same, in possession, can be conveyed, for a longer period than during the continuance of not more than one or more lives in being and twenty-one years thereafter."
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> * * * * * * *
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> "All the provisions of this subchapter shall apply to personal property generally except where from the nature of the property they are inapplicable."

Thus it is readily perceived that as the trusts in the will do not come within the exception of Section 1023, they are in contravention of that section relating to perpetuities and in restraint of alienation, and are, therefore, void. It is also evident that the validity of the trusts is to be determined by the laws of the District of Columbia and not of New York, and, as the law applies alike to realty and personalty, the theory of equitable conversion does not change the situation. The doctrine of comity cannot be extended in such a case. As Section 669 of the Code, conferring the privilege of taking property for perpetual uses upon domestic cemetery corporations, is in direct conflict with Section 1023, the former is void. And as the fund to be used for the erection of the monument is so closely identified with the void trust for its care and preservation, the two must fall together.

Before assigning error, one point can be disposed of at the threshold, viz: that the investment of money and the use of income therefrom to keep a cemetery lot in perpetual good order and condition is not a gift or devise for a charitable use and, therefore, it does not fall within the exception of Section 1023 of the Code. The Court of Appeals so decided in this case (R., 21), and this is in accord with both English and American authorities.

(1882) Jones *vs.* Habersham, 107 U. S., 174.

(1903) Estate of Gay, 138 Calif., 552.

(1901) Corle's Case, 61 N. J. Eq., 409.

(1898) Sherman *vs.* Baker, 20 R. I., 446.

(1897) Brown *vs.* Esterhazy, 25 Law Reporter, 478.
(1892) Hartson *vs.* Elden, 50 N. J. Eq., 522.
(1893) Kelly *vs.* Nichols, 17 R. I., 306.
(1891) Read *vs.* Williams, 125 N. Y., 560.
(1889) *In re* Fisher, 8 N. Y. Supp., 10.
(1885) Johnson *vs.* Holifield, 79 Ala., 423.
(1883) Bates *vs.* Bates, 134 Mass., 110.
(1883) Detwiller *vs.* Hartman, 37 N. J. Eq., 347.
(1883) Coit *vs.* Comstock, 51 Conn., 352.
(1883) Fite *vs.* Beasley, 80 Tenn., 328.
(1881) Piper *vs.* Moulton, 72 Me., 155.
(1881) Church Extension *vs.* Smith, 56 Md., 362.

Assignment of Error.

It is respectfully submitted that the lower court erred in holding as follows:

1. That the trusts created by the will do not infringe the rule prohibiting perpetuities and in restraint of alienation.

2. That the validity of the trusts depends upon the law of New York and not of the District of Columbia.

3. That the law of the District of Columbia prohibiting perpetuities and in restraint of alienation does not apply with the same strictness to personal property as to real estate.

4. That the public policy of the District of Columbia as to foreign corporations can be inferred from the law of the District as to domestic corporations.

5. That the same privileges granted by the law of the District of Columbia to its domestic corporations must be extended to foreign corporations.

6. That Section 669 of the Code of the District of Columbia is consistent with Section 1023, and, therefore, valid.

7. That the provisions for the erection of the monument and for its care and preservation can be easily separated without doing violence to testatrix's wishes.

First Error.

As the will creates a future estate, suspending the power of absolute alienation of property beyond life or lives in being and twenty-one years, it is in restraint of alienation and a perpetuity, and, therefore, void in its creation.

The testatrix directed in terms that the proceeds derived from the sale of her property be invested for a perpetual purpose. This, in effect, violates both the law in restraint of alienation and the law prohibiting perpetuities in force in the District of Columbia, the equity court to the contrary notwithstanding. That court said that the trusts in the will could by no means infringe the rule against perpetuities (R., 16), while the Court of Appeals was of the opinion that the devise of the real estate did infringe that rule and would unquestionably be void if it did not fall within certain exceptions (R., 21). As these courts were of different opinions on this point, some definitions as to what are restraints upon alienation and what are perpetuities may throw light upon this subject.

Restraints look to the present, the creation of the estate; while perpetuities look to the future, the vesting of the estate. In perpetuities the vesting may be uncertain;

while in restraints the estate is void in its creation, if suspension is even possible. The power of alienation is suspended when there are no persons in being by whom an absolute fee in possession can be conveyed.

Code, Sec. 1023; (1851) Tucker *vs.* Tucker, 5 N. Y., 408–17; (1839) Gott *vs.* Cook, 7 Paige, 521. The absolute power of alienation is equivalent to the power of conveying an absolute fee. (1895) *In re* Walkerly, 108 Calif., 647.

A perpetuity is a limitation of property which renders it inalienable beyond the period allowed by law. (1877) Ould *vs.* Washington Hospital, 95 U. S., 303. A perpetuity is any limitation or condition which may (not which will or must) take away or suspend the absolute power of alienation for a period beyond the continuance of lives in being. (1895) *In re* Walkerly, 108 Calif., 647. A perpetuity is a limitation taking the subject out of commerce for a longer period than prescribed by statute. (1884) Lunt *vs.* Lunt, 108 Ill., 307–13. Perpetuity is a word applied to attempts to invest money or restrict the alienation of land in such a way as to forever retain it for the benefit or enjoyment of persons of a particular line of descendants. (1894) Whitney *vs.* Dodge, 105 Calif., 192–200.

Under the directions contained in the will the principal vests in the trustee and is withdrawn forever from the channels of commerce and completely tied up. If the intention of the testatrix prevails there must be manifest violation of the law, for the will by its language suspends the power of absolute alienation of the prin-

cipal forever thereafter. The beneficiary of this trust is the cemetery lot, and there is and will be no person in existence who can direct or consent to alienation of this property. The whole estate is vested in the cemetery company as trustee of the fund, and any disposition of the *corpus* of the estate of the beneficiary would be a contravention of the trust and a breach of its duty. This works a suspension of the power of absolute alienation, and is therefore void.

Section 1023 of the Code, declaring a future estate suspending the power of alienation void in its creation, is most positive in its terms. The purpose of the statute is to discourage and prevent persons subject to the laws of the District from disposing of property when unlawful limitations are attached thereto. It is designed for the protection of persons interested in the estate of inhabitants of the District of Columbia, and it strikes at the very root of the evil by declaring void in its creation every instrument which suspends, or may by any possibility suspend, the power of absolute alienation of real or personal property beyond a certain time. Every transfer of property in the District of Columbia to individual or corporation is prohibited which carries with it such conditions that the grantee cannot alienate it within the statutory period.

Gray in his work on Perpetuities, Sec. 629, says:

> "The rule against perpetuities is not a rule of construction, but a peremptory command of law. It is not like a rule of construction, a test more or less artificial to determine intention. Its object is

to defeat intention. Therefore every provision in a will or settlement is to be construed as if the rule did not exist, and then to the provisions so construed the rule is to be remorselessly applied."

Such bequests have been passed upon many times by the courts and they have uniformly been declared void, both as violating the law against perpetuities and the law in restraint of alienation.

In New York, where the law in restraint of alienation is practically the same as in the District of Columbia, a testatrix provided in her will that a fund be set apart to be perpetually kept by the executors and trustees and their successors for cemetery purposes. Held, that the provision was void as an unlawful suspension of the absolute ownership of personal property.

(1891) Read *vs.* Williams, 125 N. Y., 560, 567.

A bequest of $200 was made to an executor to be expended within the time prescribed by the statute governing perpetuities in keeping a burial lot in good condition. Held to be void, because in violation of the statute forbidding a disposition of property in such a mode as to suspend the absolute ownership of personal property.

(1889) *In re* Fisher's Estate, 8 N. Y. Supp., 10.

A New York testator directed her executors to sell her real and personal estate and invest the proceeds in certain securities and pay the annual income perpetually to the "Lowville Academy." Held, that the trust was invalid as an unlawful perpetuity.

(1871) Adams *vs.* Perry, 43 N. Y., 487.

In California, where the law in restraint of alienation is similar to the law of the District of Columbia, a testator directed $2,000 to be invested and the income used for the purpose of keeping testator's burial lot in good order and proper condition. Held, that the provision was void as it created a perpetuity.

(1903) Estate of Gay, 138 Calif., 552–6.

Testatrix provided in her will for a monument at her grave and left a sum "to be kept in trust to beautify and keep it in good order." Held, a perpetuity and void.

(1883) Bates *vs.* Bates, 134 Mass., 110.

A bequest of a fund was made to be held in trust forever to expend the income as might be necessary to keep a lot in the burying ground in good order and condition. Held void as creating a perpetuity.

(1881) Piper *vs.* Moulton, 72 Maine, 155.

(1904) McIlvain *vs.* Hockaday (Texas), 81 S. W., 54.

(1901) Corle's Estate, 61 N. J. Eq., 409.

(1898) Sherman *vs.* Baker, 20 R. I., 446.

(1892) Kelly *vs.* Nichols, 17 R. I., 306.

(1893) Hartson *vs.* Elden, 50 N. J. Eq., 522.

(1891) Read *vs.* Williams, 125 N. Y., 560.

(1883) Coit *vs.* Comstock, 51 Conn., 352.

(1883) Fite *vs.* Beasley, 80 Tenn., 328.

(1883) Detwiller *vs.* Hartman, 37 N. J. Eq., 347.

(1881) Church Extension *vs.* Smith, 56 Md., 362.

Second Error.

The validity of the bequest and devise is to be determined by the laws of the District of Columbia.

The Court of Appeals in its opinion said it was fair to presume Congress recognized the well-established rule that "while the laws of the testator's domicile govern as to the formal requisites essential to the validity of the will, the capacity of the testator and the construction of the instrument, the validity of particular bequests depends (*unless expressly prohibited by the law of the testator's domicile*) upon the law of the domicile of the legatee." (R., 22.)

It is respectfully submitted that the learned court was in error not only as to the rule of law being well established and generally followed and which it presumed Congress recognized, but also as to the application of that law to this case, for three reasons: *First.* The validity of a devise of real estate depends upon the *lex loci rei sitae*, while a bequest of personal property depends upon the *lex domicilii*. *Second.* The validity of particular bequests does not depend upon law of domicile of legatee, except in particular instances. *Third.* The dispositions in this will fall within the expressed exception of the rule quoted, for they are positively prohibited by the law of testatrix's domicile.

First. The comprehensive and explicit language of Section 1023 of the Code leaves no doubt that Congress intended to inhibit every transfer of property that would in any manner offend its provision, whether the estate created was for domestic or foreign uses. It interdicts

both the power to dispose of, and the right to receive, property, and there can be no valid ground for the position that Congress meant the statute to be confined in its operation to the mere formal requisites essential to the valid execution of a will. The object Congress had in view was the absolute extermination of all estates raising perpetuities or restraining alienation, and the statute was directed at each and all instruments of title that did so, and it would be a forced and constrained construction to hold that such a statute could be avoided and set at naught and the very intent and language of the act frustrated by the bare fact of non-residence of a legatee. If such a strained construction would apply to wills, consistency would compel its application to deeds, yet there are no cases that hold that the validity of a deed depends upon the domicile of the grantee. The common law and the law in force throughout the States of the Union, except as modified by statute, are that *the validity of bequests depends upon the law of the testator's domicile*, and if Congress had desired to change this universal law or to make any exception thereto, it would have expressed its will in language that would permit no doubt or double construction.

This Court is authority for the position that the validity of a devise, as against the heirs at law, depends upon the law of the State in which the lands lie, and the validity of a bequest, as against the next of kin, upon the law of the State in which the testatrix had her domicile.

(1882) Jones *vs.* Habersham, 107 U. S., 174-9.
(1844) Vidal *vs.* Girard, 2 How., 127.
(1849) Wheeler *vs.* Smith, 9 How., 55.
(1853) McDonough *vs.* Murdoch, 15 How., 367.
(1854) Fontain *vs.* Ravenel, 17 How., 369.
(1860) Perin *vs.* Carey, 24 How., 465.
(1867) Lorings *vs.* Marsh, 6 Wall., 337.
(1867) United States *vs.* Fox, 94 U. S., 315.
(1879) Kain *vs.* Gibboney, 101 U S., 362.
(1882) Russell *vs.* Allen, 107 U. S., 163.

"It is an established principle of law everywhere recognized, arising from the necessity of the case, that the disposition of immovable property, whether by deed, descent, or any other mode, is exclusively subject to the government within whose jurisdiction the property is situated. * * * Every person must, therefore, devise his lands in that State within the limitations of the statute or he cannot devise them at all. His power is bounded by its conditions."

(1876) U. S. *vs.* Fox, 94 U. S., 315.

"It is a principle firmly established that to the law of the State in which the land is situated we must look for the rules which govern its descent, alienation and transfer, and for the effect and construction of wills and other conveyances."

(1896) De Vaughn *vs.* Hutchinson, 165 U. S., 566, 570.

A testator domiciled in Wisconsin left a will directing his real and personal property in Wisconsin and other States to be sold and the proceeds invested in land in

Missouri. The trust was in violation of the law of Wisconsin as to restraints upon alienation, which law is the same as that in force in the District of Columbia. The court held that the will was void so far as the real estate in Wisconsin was concerned, saying:

> "The validity of every devise or disposition of real estate by will must be governed by the law of the place where the land is situated, and this includes not only the form and mode of the execution of the will, but also the lawful power and authority of the testator to make such disposition. * * * On the contrary, although not as well defined, nor as extensively enforced, yet the authorities clearly support the proposition that *the validity of a bequest or disposition of personal property by last will and testament must be governed by the law of the testator's domicile at the time of his death, and this includes not only the form and mode of the execution of the will, but also the lawful power and authority of the testator to make such disposition;* and especially is this true where, as here, the testator's domicile at the time of making his will continues to be the same until the time of his death."
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> (1887) Ford *vs.* Ford, 70 Wis., 19–44.

The rule is well settled in Massachusetts. A citizen of that State made a bequest in trust to a town in New York, and it was held upon full consideration that the bequest was valid, and that its validity was to be determined by the law of Massachusetts and not by the law of New York, where the trust was to be executed. Gray, Chief Justice, said:

"But the testator's domicile being in this Commonwealth, the question of the validity of his dispositions of his personal property, though to be executed elsewhere, is to be determined by the law of Massachusetts."

(1876) Fellows *vs.* Miner, 119 Mass., 541.

A testator, domiciled in Pennsylvania, ordered his executors to sell all his real estate in Virginia and Pennsylvania, and after payment of certain bequests, to give the residue to Winchester, Virginia, for the education of the poor. Judge Gray said:

"At the threshold of the discussion of these contentions, it is necessary to inquire what law is applicable to their determination, the law of Pennsylvania or the law of Virginia. As to this, we can do no better than to quote the language of the learned judge of the court below: '*It is clear that, as respects all of the testator's personal estate and his real estate situated in the State of Pennsylvania* (*he having devised real estate in Virginia, West Virginia and Pennsylvania,*) *the validity of the residuary clause is to be determined by the laws of Pennsylvania; the testator's domicile having been there at the date of his will and at the time of his death.*'"

(1900) Handley *vs.* Palmer, 103 Fed. Rep., 39–40.

A testator domiciled in Canada directed his executor to sell and convert all his estate, real and personal, into cash, and after payment of his debts to turn over the residue to the State of Vermont, in the United States, to be disposed of as it should deem best. Held, that although valid in Vermont, as the devise of real estate

contravened the statute of mortmain in force in Canada, that it was void.

(1880) Parkhurst *vs.* Roy, 7 Ontario Appeals, 618.

The validity of a trust as to real estate is to be determined by the law of its situs; as to personal property by the law of the domicile of the testator at the time of his death.

(1890) Penfield *vs.* Tower, 1 N. D., 216.

From considerations of justice and the principle of comity the dispositions of personal property is governed by the law of the domicile of the owner, and this rule has so general a sanction among all civilized nations that it may be treated as part of the *jus gentium*, and is part of the general law of every State in which it has not been abrogated by statute, either expressly or by necessary implication.

(1894) Whitney *vs.* Dodge, 105 Calif., 192.

The validity of a will of real property is to be determined by the laws and courts of the jurisdiction in which such real estate is situated and *not by any other law or by any other tribunal.*

(1898) Readman *vs.* Ferguson, 13 App. D. C., 60.

Second.—It is true that there are some cases (mostly in New York) that hold that the validity of bequests depends upon the law of the legatee's domicile, but it is submitted that the broad statement of the doctrine has been greatly modified and that the principle decided by them does not apply to the case at bar. There are two leading cases in New York that announce the above

proposition. In those cases it will be noticed, *first*, that the will directs the executor to pay over the entire fund to the foreign legatee, while in the case at bar no such direction is given, but the trustee is only to have the use of the income; *second*, that those trusts are for charity, while in the case at bar the trust is for a private purpose. In this connection it must constantly be borne in mind that charities are the favorites of the courts and that the public policy of New York is to allow its citizens free power to dispose of their personalty when it is to be taken to a foreign country and there administered for charity. The New York courts have by construction excepted charities from the operation of the State law, and Congress has adopted New York's benevolent view of the situation by embodying that exception in its statute.

One case is (1892) Hope *vs.* Brewer, 136 N. Y., 126, where a testator domiciled in New York directed his executors to convert all his property into cash and pay the proceeds to foreign trustees *to found and maintain a foreign charity.* The court said:

> "If personal property is disposed of by will, *and in trust for charity, to take effect in another country*, no good reason is apparent for insisting that a full compliance with the local law of the domicil, with respect to the form or duration of the trust, or the definition of the beneficiaries, is necessary to the validity of the disposition. * * * When a citizen of this State, or a person domiciled here, *makes a gift of personal estate to foreign trustees for the purpose of a foreign charity*, our courts will not

interpose our local laws with respect to trusts and accumulations to arrest the disposition made by the owner of his property, but will inquire as to two things: *First*, whether all the forms and requisites necessary to constitute a valid testamentary instrument, under our law, have been complied with; and, *second*, whether the foreign trustees are competent to take the gift, for the purposes expressed, and to administer the trust under the law of the country where the gift was to take effect. * * * In order to sustain this will, we must go a step further, and hold another, but a kindred, proposition, namely, that a disposition of personal property made in this State, by a competent testator, *in a valid testamentary instrument, to trustees in a foreign country, for the purposes of a charity to be established in that country*, is valid, although not in compliance with our statute or the rules of law in force here in regard to trusts and perpetuities, providing it is valid by the law of the place where the gift is to take effect, and which governs the trustees and the property when transmitted there."

Until it is shown that the laws and public policy of New York and the District of Columbia are identical this decision can have no force in this jurisdiction as it is made very plain that it was influenced by a public policy peculiar to New York, for the court, continuing its opinion, said:

"The law of this State inhibiting the creation of trusts not expressly authorized by statute and the suspension of the power of alienation of real estate and the absolute ownership of personal property, *is founded upon a public policy of our own.*"

The other case is (1871) Chamberlain *vs.* Chamberlain, 43 N. Y., 424, where a testator domiciled in New York directed one-half of his residuary fund to be paid to *a foreign corporation for charitable purposes.* A bill was filed by the heirs at law for construction. The court said:

> "*Bequests in aid of foreign charities*, valid and legal, in the place of their existence, will be supported by the courts of the State in which the bequests are made."

And in this case as in the other, the public policy of New York was a controlling factor leading to the conclusion of the Court, for it said: "*But so far as the validity of bequests depends upon the general law and policy of the State* affecting property and its acquisition generally, and relating to its accumulation and the suspension of ownership and the power of alienation, *each State is sovereign as to all property within its territory*, whether real or personal." In both of these cases the property is personalty, while in the case at bar the property is realty and personalty. One of the requisites for the application of the law announced in one case is that the disposition must be made by "valid testamentary instrument," and in the other that the will must have "all the forms and requisites to pass title." But the case at bar does not possess either essential, for the will, instead of being a "valid testamentary instrument," is absolutely void under Section 1023 of the Code, and that being true, it does not possess the "requisites to pass title."

Even in (1852) Vansant *vs.* Roberts, 3 Maryland, 119,

cited in the Chamberlain case (*supra*), the court restricted its observation on the point *to trustees in trust for charity and to a foreign corporation for purposes of charity.* And in the State of Maryland at that time there was no law in restraint of alienation or any prohibitive act like Section 1023.

In (1905) Robb *vs.* Washington and Jefferson College, 103 App. Div., N. Y., 327, where a New York testator left certain securities to a foreign corporation for educational purposes, upon a bill filed to have a legacy declared illegal, the court, after discussing the authorities bearing upon the question, summed up its conclusion by saying:

> "It has already been shown that *a gift or devise to a charitable corporation is not within the laws of New York prohibiting perpetuities.*"

In (1898) Congregational Society *vs.* Hale, 29 App. Div., N. Y., 396, the question was whether a bequest to a trustee of a foreign corporation to use the income to keep a cemetery lot in repair and the balance toward support of preaching the gospel was legal. It was held that the former was invalid under the laws of Massachusetts, but that the latter was valid as a bequest *for a foreign charity.*

The court recognized that the rule was confined to charities in (1888) Holland *vs.* Alcock, 108 N. Y., 337, where the question was as stated by the court, "whether the grantor or devisor of *a fund designed for charity*, is competent to give; and whether the organized body is endowed by law with capacity to receive and to hold and administer the gift."

The best evidence that the New York decisions on this subject are confined to cases of foreign charities is (1892) Cross *vs.* U. S. Trust Co., 131 N. Y., 330. There a testatrix in Rhode Island left bonds in trust to a New York corporation to pay over income to husband and children. The trust was valid at domicile, but invalid in New York, where the property and trustees were and where the trust was to be administered. On the theory that the validity of particular bequests depends upon the domicile of the legatee, the heirs at law sought in New York to have the bequest declared void under its laws. The court said:

> It can, therefore, be safely asserted that there is no controlling authority in this State in support of the proposition that the validity of bequests in foreign wills may be tested by some other law than that which governs the will in other respects, or that requires us to disregard the disposition made of the fund in this case under the law of another State. * * * A rule which prescribes the formal requisites and construction of a will, and the testator's capacity, are to be determined by the laws of one State, and the validity of his dispositions of personal property, by the laws of some other State or country, *would be exceedingly inconvenient and uncertain, and no sound principle or decisive authority requires us to sanction it. All these questions should be determined by the same law.*"

In the last case the court said that when Judge Allen decided in the Chamberlain case (*supra*) that the validity of a particular bequest would depend upon the law of

the domicile of the legatee that he had reference to the capacity of the legatee to take.

But the doctrine in the two leading cases is further substantially restricted. In the Chamberlain case the court said that the validity of particular bequests also depends upon the law "of the government to which the fund is, by the terms of the will, to be transmitted for administration;" while in the Hope-Brewer case it declares such a bequest valid "provided it is valid by the law of the place where the gift is to take effect, and which governs the trustee and the property when transmitted there." And this enunciation of the meaning of the principle makes it pertinent to inquire whether the trust fund in this case is to be administered in the District of Columbia or is it to be transmitted to the State of New York; in other words, are the executors under the will, or the Greenwood Cemetery Company, made the trustee of the fund and charged with the duty of making the investments and turning over the income to be used for cemetery purposes.

The will by the first and twelfth paragraphs raises two trusts: first, the real estate to be held for the use of the Igleharts during their lives; second, the proceeds of the sale of the real estate and the residue of personal property to be invested in securities, the income therefrom to be used by the Greenwood Cemetery Company. The Cemetery Company was specifically named trustee for the former. No trustee was designated for the latter.

It will be noticed that the will not only does not name a trustee to carry out the objects of the second trust, but

it negatives the idea that the Greenwood Cemetery Company was to do so by directing it to use, not invest, the income "as trustees." It is apparent from the language of the will that the testatrix did not intend the Cemetery Company to make the investment in United States securities, hold the same as trustee, and pay over the income to itself to "be used" as trustee. The intention was that this fund should be invested by the executors, the income therefrom to be paid by them to the Cemetery Company and by it "used" as trustee. This construction is in accord with the law that where a will raises a trust without naming the trustee that the executor shall execute the trust. Thus in the case of (1889) Mitchell *vs.* Thompson, 18 District of Columbia, 130, a testator made his debtor his executor, and directed that the money due from him be invested in land for the use of another; it was held that the executor was charged with the duty of making the investment, as no other person was named.

This seems to be the settled law on this point.

(1878) McBurney *vs.* Carson, 99 U. S., 567–72.
(1879) Richardson *vs.* Knight, 69 Me., 285.
(1872) Pettingill *vs.* Pettingill, 60 Me., 11.
(1860) Holbrook *vs.* Harrington, 16 Gray, 102.

Third.—The case cited by the Court of Appeals excepts from its broad sweep (*a*) bequests expressly prohibited by the law of the testator's domicile, or (*b*) in contravention of its public policy. The case at bar falls within both exceptions stated, for Sec. 1023 of the Code

expressly prohibits the creation of such estates as this will attempts to raise; and whatever the law condemns is against the public policy of the State.

(*a*) In the Chamberlain case (*supra*), on which authority the case cited in the opinion of the Court of Appeals rests, the court said:

> "*If the law of the testator's domicile, in terms, forbids bequests for any particular purpose, or in any other way limit the capacity of the testator in the disposal of his property by will, a gift in contravention of the law of the testator's domicile would be void everywhere.* But so far as the validity of bequests depends upon the general law and policy of the State affecting property and its acquisition generally, and relating to its accumulation and a suspension of ownership and the power of alienation, *each State is sovereign as to all property within its territory, whether real or personal.*"

In (1891) the matter of Huss, 126 N. Y., 537, the court, in passing upon the validity of a gift and announcing the rule, noted as an essential element *that the laws of New York did not prohibit the bequest.*

In (1898) Congregational Society *vs.* Hale, 29 App. Div. N. Y., 396, the court said:

> "It is well settled in this State, * * * that the validity of particular bequests depends (*unless expressly prohibited by the law of testator's domicile*) upon the law of the domicile of the legatee."

Hill on Trustees, an authority relied on by the court in the Chamberlain case (*supra*), at Section 454, says *that*

a trust for a foreign charitable purpose cannot be supported here, *if it contravenes the policy of the English law*, although it may not be illegal according to the laws of the State where the charity is to be established.

The Appellate Court seems to have completely ignored the positive inhibition of Section 1023, and contented itself with saying that it scarcely seems possible that Congress intended to be so narrow as would be the case if Section 1023 were literally enforced. But the courts cannot disregard the voice of the legislature in such a way. When its will is expressed in words of plain import the court is bound to conform its action to their meaning and cannot refuse to give them effect, because it seems such a course would be narrow, unreasonable, or work a great hardship. When language of a statute is explicit there is great danger in the court's departing from the words used to give an effect to the law which it may suppose to have been designed by the legislature. It is not for the court to say where the language of a statute is clear that it shall be so construed as to embrace other cases, because no good reason can be assigned, or the court fails to see, why they were excluded from its provision. (1836) Denn *vs.* Reid, 10 Peters, 524. The courts have no function of legislation and simply seek to ascertain the will of the legislator, and no mere omission, no mere failure to provide for contingencies, which may seem wise to have been specifically provided for, justify any judicial addition to the letter of the statute. (1897) U. S. *vs.* Goldenberg, 168 U. S., 95, 102. It is the duty of courts in the interpretation of statutes to declare the

law as it is; and the interests of society are best subserved by a close adherence by courts to what they find to be the plain meaning, neither narrowing the application on the one hand, nor extending the meaning on the other, to meet cases not specified which may seem to be within the reason of the law. (1893) Matter of Estate of Prime, 136 N. Y., 347.

When Congress says "every estate," there is no power in the courts, if they correctly interpret the statute, to except from its operation estates devised to foreign corporations, thereby substituting the word "some" for "every." If Congress had intended that this statute should not apply to foreign corporations, it would have said so; but instead of doing this it has said "every," and this word of universality embraces both domestic and foreign corporations. The case at bar is not unlike (1896) U. S. *vs.* Freight Association, 166 U. S., 290, and the reasoning there applies with peculiar force here. There the question was whether an act of Congress providing that "every contract * * * in restraint of trade or commerce * * * is hereby declared to be illegal" applied to and covered common carriers by railroad. It was contended that the statute was not really intended to reach an agreement between competing common carriers, but only corporations engaged in the manufacture or sale of articles of commerce. The court said that the terms of the act do not bear out such a construction. That the language of the act includes *every* contract, and any contract in restraint of trade is by the strict language of the act prohibited; and that there is

no escape from the conclusion that if any agreement in restraint of trade does restrain it, that the agreement is condemned by the act. That it cannot be seen how the statute can be limited without reading into its text an exception which alters the natural meaning of the language used upon a most material point. That no exception or limitation can be added without placing in the act that which has been omitted by Congress.

(*b*) There can be no better indication of the attitude of Congress toward foreign cemetery corporations taking property for perpetual uses than the positive and express prohibitory clause in Section 1023 of the Code, and the rule of law is that whatever the statute condemns or prohibits is against the public policy of the State.

(1884) Hollis *vs.* Drew Theo. Sem., 95 N. Y., 166–72.

Some very positive expressions are found on this subject in the recent case of (1896) U. S. *vs.* Freight Association, 166 U. S., 340, where the court said:

> "The public policy of the Government is to be found in its statutes, and when they have not directly spoken, then in the decisions of the courts and constant practice of the government officials; but when the law-making power speaks upon a particular subject, over which it has constitutional power to legislate, public policy in such a case is what the statute enacts. If the law prohibit any contract or combination in restraint of trade or commerce, a contract or combination made in violation of such law is void, whatever may have been theretofore decided by the courts to have been the public policy of the country on that subject."

In (1890) St. Paul Railway Co. *vs.* Phelps, 137 U. S., 536, the court said:

> "Where a statute is clear and free from all ambiguity, we think the letter of it is not to be disregarded in favor of a mere presumption as to what is termed the policy of the Government."

Again, in (1866) Hadden *vs.* The Collector, 5 Wallace, 111, the court said that—

> "What is termed the policy of the Government with reference to any particular legislation is generally a very uncertain thing, upon which all sorts of opinions, each variant from the other, may be formed by different persons. It is a ground much too unstable upon which to rest the judgment of the court in the interpretation of statutes."

The Court of Appeals desires to go beyond the record and look to conditions which it supposes prevail in the District and from them ascertain the public policy. For instance, the court is of the opinion that in determining the public policy of the District towards foreign cemetery associations that the fact should be considered that so many of its people come from other localities, or are the descendants of those from other localities, and while passing their lives here expect upon death to be laid in cemeteries located outside of the District and which are not incorporated under its laws. And further, that in interpreting the laws of the District of Columbia on this subject that significance should be attached to the fact that they are enacted by Congress representing all parts of our common country (R., 23). Just what weight and

consideration should be given to such speculations and conceptions in defining a State's public policy or in interpreting the laws of its legislature it is difficult to determine. But it is certain that such theories are not in harmony with expressions of this court.

The appellate court said that it could not be successfully contended that whatever the District of Columbia p rmits to its own corporations is so far against its publi policy that it will not permit the same privileges to a foreign corporation (R., 22). Thus the court attempts to gauge the public policy of the District of Columbia towards foreign corporations by the statute enacted for the organization and management of its domestic corporations. Such standard is not only based on false reckoning, but it is condemned by the courts, hazardous and uncertain in its results, and is not the law. In (1894) Vanderpoel *vs.* Gorman, 140 N. Y., 563, where it was urged that a public policy as to foreign corporations was to be found in a statute, even though its terms applied only to domestic corporations, Mr. Justice Peckham said, that the difference between domestic and foreign corporations are so marked that a statute regarding domestic corporations can furnish no proof as to the existence of public policy, which, in the case of foreign corporations, should stand in the place of, and be equivalent to, that statute.

The Court of Appeals in the case at bar said:

> "It scarcely seems possible that Congress intended to be so narrow as would be the case if it intended, in permitting cemeteries incorporated

> under the laws of the District to take and hold property for the purpose specified, to refuse to recognize a like right in similar companies incorporated under the laws of the various States where a like privilege is granted." (R., 22.)

The effect of the court's reasoning is to carve out another exception from the general prohibition of Section 1023 in favor of foreign cemetery companies. If the court has the power to do that and to except such corporations, it has the further right to accept all foreign corporations, and then individuals, and so nullify the law entirely. In the case of (1896) U. S. *vs.* Freight Association, 166 U. S., 340, the same theory was advanced by counsel that seems to have been entertained by the Court of Appeals in this case. There it was contended that although the language of the statute of prohibition included all contracts in restraint of trade, yet it must be presumed that Congress could not have intended to embrace all contracts, but only such contracts as were in *unreasonable* restraint of trade. The court said:

> "Under these circumstances we are, therefore, asked to hold that the act of Congress excepts contracts which are not in unreasonable restraint of trade, and which only keeps rates up to a reasonable price, notwithstanding the language of the act makes no such exception. In other words, we are asked to read into the act by way of judicial legislation an exception that is not placed there by the law-making branch of the Government, and this is to be done upon the theory that the impolicy of such legislation is so clear that it cannot be

supposed Congress intended the natural import of the language it used. This we cannot and ought not to do. That impolicy is not so clear, nor are the reasons for the exception so potent as to permit us to interpolate an exception into the language of the act, and to thus materially alter its meaning and effect. It may be that the policy evidenced by the passage of the act· itself will, if carried out, result in disaster to the roads and in a failure to secure the advantages sought from such legislation. Whether that will be the result or not we do not know and cannot predict. These consideration are, however, not for us. If the act ought to read as contended for by defendants, Congress is the body to amend it and not this court, by a process of judicial legislation wholly unjustifiable."

Third Error.

Even though there is equitable conversion from realty to personalty, yet the bequests will nevertheless fall within the prohibition of the statute.

The lower courts were of the opinion that as the property was converted into personalty under the terms of the will that the law in restraint of alienation did not apply to the case as strictly as if it had been realty. The equity court said, so far as the converted proceeds are concerned, the District of Columbia manifestly cannot be interested, whether or not a perpetuity is created; while the Court of Appeals said:

"The real estate being once converted into personalty, it matters even less than in the case of real estate to the District of Columbia whether such

> property goes into the hands of a foreign corporation to be held in trust as a perpetuity, or whether it be put to other uses." (R., 23.)

But these positions are met and refuted by the provisions of the law itself, which puts the matter beyond argument. A general clause of the subchapter of the Code, which contains Sec. 1023, provides:

> "All the provisions of this subchapter shall apply to personal property generally, except where from the nature of the property they are inapplicable."

Therefore it does not relieve the situation to say that there is an equitable conversion to personalty resulting from the direction of sale in the will, and that this law does not apply to personalty. The doctrine of conversion cannot circumvent the prohibition of the statute when the resultant proceeds wear the same fetters as restrained the alienation of the land.

(1889) Cruikshank *vs.* Home, 113 N. Y., 337, 352.

The law of California (the same as in the District of Columbia) against suspension of the power of alienation applies to personal as well as to real estate, it being in that part of the Code dealing with modification of ownership and restraints on alienation of property in general.

(1895) *In re* Walkerly, 108 Calif., 627.

If a trust be created, by which the possession of personal property and the legal estate therein is vested in the trustees during the continuance of the trust, an absolute ownership of personal property is suspended within

the meaning of the statute, the absolute ownership of personal property being suspended by the creation of a trust in the same manner as alienation of real estate.

(1891) Underwood *vs.* Curtis, 127 N. Y., 537.

In North Dakota where the statute is the same as in District of Columbia, the court said that the power to change the trust property from real to personal estate will not save the trust from the condemnation of the statute. The validity of a trust of converted personalty is to be determined by laws of testator's domicile.

(1890) Penfield *vs.* Tower, 1 N. D., 216.

Though executors are directed to sell real property and convert it into money, and actually make such sale, the proceeds are not thereby converted into personalty, if the purpose for which the sale was directed to be made is one not permitted by law.

(1897) Fifield *vs.* Van Wyck, 94 Va., 557.

Where a will directs the conversion of realty into personalty for a particular but void purpose, the doctrine of equitable conversion does not apply; but unless otherwise clearly indicated by such will such realty will pass to the heirs as property undisposed of thereby.

(1900) Harrington *vs.* Pier, 105 Wis., 485.

If a conversion is directed for a particular but void purpose, the doctrine of equitable conversion does not apply.

(1891) Read *vs.* Williams, 125 N. Y., 560.

Fourth Error.

The doctrine of comity has no application, because to recognize the foreign cemetery company would violate the settled policy of the District of Columbia distinctly marked by Congressional legislation.

By section six of the Greenwood Cemetery Company's charter, it is permitted to take any bequest upon trust to apply the income to the care and preservation of any cemetery lot according to the terms of the grant. (R. 9.)

The general law of the District of Columbia, regulating the formation and government of cemetery associations and conferring upon them certain rights and privileges, is found in the Code of the District of Columbia in Chapter 18, subchapter 6, and provides for their incorporation, powers, officers, election, by-laws, exemption from taxes, dedication of land, location, lots and plats, place and mode of burial, and prosecutions for violation of the law. Section 669 of said subchapter provides as follows:

> "SEC. 669.—*Grants and Bequests for Care of Lots.*—It shall be lawful for such association to take and hold any grant, donation, or bequest, upon trust to apply the income thereof, * * * for the preservation * * * of any tomb * * * according to the terms of such grant, donation, or bequest; *and the Supreme Court of the District of Columbia shall have full power and jurisdiction to compel the due performance of such trusts, or any of them, upon a bill filed by the proprietor of any lot in such cemetery for that purpose.*"

It was contended by opposing counsel in the courts below that as the statute in force in the District of Columbia favored bequests to domestic cemetery companies, and contained no prohibition against foreign cemetery associations, that comity required the will to be sustained. This view seems to have been adopted by the Court of Appeals (R., 22). Two cases of this court are cited as authority for this position.

The first is (1879) Cowell *vs.* Springs Co., 100 U. S., 55, where it was claimed that as a general statute of Colorado authorized the creation of corporations only for mining, manufacturing, and other industrial pursuits, that all foreign corporations not chartered to do business of this nature were prohibited from the exercise of their charter powers in that Territory; and if domestic corporations could not be created with such powers, for reasons of public policy, a foreign corporation could not for like reasons be permitted to exercise them in the Territory. The court said the position was answered by *general comity, which in the absence of positive direction to the contrary, obtains throughout the States.* That the policy of the State cannot be inferred from the fact that the legislature has made no provision for the formation of similar corporations, or allows corporations to be formed only by general law, but that such policy must be expressed in some affirmative way.

The other case is (1879) Christian Union *vs.* Yount, 101 U. S., 352. It was contended that by the settled law of Illinois a foreign corporation could not hold lands in that State. But the Court held that there was no such

settled law in that State, and in the absence of direct legislation on the subject that the presumption should be indulged that a corporation of one State, not forbidden by the laws of its being, may exercise within any other State the general powers conferred by its own charter, *unless prohibited from so doing, either in direct enactments of the State or by the public policy to be deduced from the general course of legislation or from the settled adjudications of its highest courts.*

The two cases apply with peculiar force to the case at bar. But court and counsel have misconceived their application. It is not maintained that the public policy of the District of Columbia as to foreign cemetery corporations can be inferred from the fact that Congress has made no provision for the formation of similar corporations, as held in the first case; nor that the presumption should not be indulged in favor of the Greenwood Cemetery Company's exercise of its corporate rights in the District of Columbia, as held in the other. But conceding both the inference and presumption, it is strenuously urged that when Congress by Section 1023 declared every future estate void in its creation that should suspend the absolute power of alienation, such language rebuts the aforesaid inference and presumption. The terms of the statute embrace every estate bequeathed or devised for a perpetual purpose, whether to domestic or foreign corporations, and it is an announcement of the public policy of the District of Columbia toward foreign corporations prohibiting them from taking such estates. Such a public policy is in the words of the decisions

"not only deduced from the general course of legislation," but is "expressed in some affirmative way."

In this connection it may be noticed that the Court of Appeals cites no authority for its position, but depends on inference, supposition and its own reasoning for the conclusion it reaches. It is therefore safe to infer that the District of Columbia has no public policy as to the recognition of foreign cemetery associations that has ever been indicated, either directly or indirectly, by act of Congress or by the adjudications of its highest court. This branch of the case can best be determined by ascertaining: *First*, what is comity? *second*, what tribunal establishes the State's public policy? *third*, to what limits should it be carried?

First. Comity means general reciprocity, and yields as a favor what cannot be claimed as a right. It persuades, but does not command, and its obligation is not imperative. It is the recognition which one State allows within its territory to the legislative, executive, or judicial acts of another State, having due regard both to international duty and convenience and to the rights of its own citizens or of other persons who are under the protection of its laws. (1894) Hilton *vs.* Guyot, 159 U. S., 113–164. Comity is not a rule of law, but one of practice, convenience, and expediency. (1899) Mast *vs.* Stover, 177 U. S., 488.

Second. Recognition of foreign corporations is not a public policy to be established by the courts. It would be a bold claim for anyone to make that the courts, in the enforcement of a supposed public policy, could apply

any limitation to the numerous domestic corporations to which the statute law had not applied it, and no more can it be applied to foreign corporations without the sanction of law. (1884) Hollis *vs.* Drew Theo. Sem., 95 N. Y., 176.) Comity is the comity of States, and not the comity of courts. (Thompson on Corporations, Sec. 7884). The power of determining whether and how far, or with what modification, or upon what conditions, the law of one State or of any rights dependent upon them, shall be recognized in another, is a legislative one; and the judiciary must be guided in deciding the question upon the principle and policy adopted by the legislature. (1872) Thompson *vs.* Waters, 25 Mich., 214. Every nation must be the final judge for itself, not only of the nature and extent of the duty (of comity), but of the occasions on which its exercise may be justly demanded. (Story's Conflict of Laws, Secs. 33–8.) It is the legislative and not the judicial power of the State that must control and give shape to its public policy and apply it to cases that arise, and this public policy must be determined by reference to its general legislation, either by prohibitory or enabling acts or by its general course of legislation on the given subject. (1873) Carroll *vs.* St. Louis, 67 Ill., 568.

Third.—The courts seem to be of one accord that comity will not be extended when to do so would violate the public policy as indicated by statute. Comity gives way where the established policy of the legislature indicates to its courts a different rule. (1888) Walworth *vs.* Harris, 129 U. S., 364. Comity does not permit the exercise of a power by a corporation when the policy of

that State, distinctly marked by legislative enactment or constitutional provision, forbids it. (1853) McDonogh *vs.* Murdoch, 15 How., 113. (1868) Paul *vs.* Virginia, 8 Wallace, 168–81. Courts out of comity will enforce the law of another State, when by such enforcement *they will not violate their own laws or inflict an injury on some one of their citizens*, as these courtesies are extended when they are not prevented by some positive law of the State. (1895) Franzen *vs.* Zimmer, 35 N. Y. Supp., 612. Mere comity can never compel courts to give effect to laws of another State which directly conflict with the laws of their own State and are contrary to its known public policy. Wharton on Conflict of Laws, Sec. 598.

Fifth Error.

A State statute granting powers and privileges to corporations must, in the absence of plain indications to the contrary, be held to apply to domestic corporations only.

The Court of Appeals did not recognize this law as applicable to this case. But the intention of Congress to confine Sec. 669 to domestic corporations is clearly indicated in two ways. *First.* By the apt words of the statute. *Second.* By the natural deduction that a sovereign power intends to confer privileges only upon corporate bodies formed under its laws.

First. The local nature of this statute is shown not only by the words of the Section 669 that "it shall be lawful for *such* associations" (meaning only associations organized under the general act) "to take and hold any grant, etc.," but by the further provisions providing for the

number of the corporation's officers, their respective duties, elections, and who shall constitute the voters. These matters of corporate administration fall peculiarly within the province of the sovereign power granting the charter and, therefore, Congress would not attempt to prescribe them for a foreign corporation.

But the intention of Congress to restrict to domestic corporations such privileges is especially emphasized by the last clause of Sec. 669, which confers upon the Supreme Court of the District of Columbia jurisdiction to enforce such bequests at the instance of a lot owner. Clearly this remedy could not be pursued against a foreign cemetery corporation which had no habitat in the District of Columbia. That court could not compel the "due performance of this trust" by the Greenwood Cemetery upon a bill filed in the District of Columbia by a lot owner. Should this money be turned over to the Greenwood Cemetery Company, it would then be taken beyond the limits of the District of Columbia and the company would not be required under the law to give bond for the performance of its duties as trustee. The corporation would be accountable in the courts of the District of Columbia to no one for failure of performance, for manner of performance, or for any breach of trust whatever. This law was framed to prevent just such a condition from arising as exists in this case by restricting the privilege of taking bequests for perpetual purposes to domestic corporations over which the local courts have jurisdiction and exercise powers of visitation and control. It would not be within the scope of a just

and enlightened public policy to allow trust funds to be received by a foreign corporation under a will invalid in the District of Columbia, and even less so to permit them to be carried to another jurisdiction and there appropriated to whatsoever use it pleases without let or hindrance, while the domestic corporations are answerable to laws requiring strict accountability.

Second. The best considered authorities are not in accord with the Court of Appeals on this point, and they reason that a sovereign power in bestowing privileges upon its domestic corporations assumes certain responsibility of visitation in connection with the exercise of those privileges, which responsibility in the nature of things could not attach to foreign corporations. A few cases will be referred to.

In (1876) United States *vs.* Fox, 94 U. S., 315–21, a statute provided that "no devise to a corporation shall be valid unless such corporation be expressly authorized by its charter or by statute to take by devise." The court said the term *corporation* in the statute applied only to such corporations as are created under the laws of the State.

A testator domiciled in New Jersey gave two funds of $5,000 each to two cemetery companies, one in New Jersey and one in Maine, and directed that the income be used to perpetually keep certain graves therein in repair. The executor filed a bill for the construction of the will and the heirs at law contended that the bequests were void, because they were indefinite and vague, and the will created a perpetuity for uses not

charitable. New Jersey has a statute almost identical with that of the District of Columbia that permits cemetery associations incorporated under its general statute to take and hold property for preservation and repair of graves and monuments. The court held that as the bequest for the local cemetery association came within the provisions of the State statute it was valid, but speaking of the bequest to the foreign cemetery association, said:

> "In attempting to apply this statute to the present case, it is, in the first place, perceived that the Buxton Cemetery Company is a corporation of another State, and, therefore, not within the protection of the legislation. The law is applicable only to certain cemetery companies created by or under the laws of this State and cannot avail the Buxton Cemetery Company."
>
> (1892) Hartson vs. Elden, 50 N. J. Eq., 522.

A statute provided that "any religious, educational * * * or charitable corporation, or corporation organized for * * * other than business purposes" should have the right to acquire and hold property. The act further provided "the personal estate of such corporations shall be exempt from taxation." It was contended that this exemption extended to all charitable and religious corporations, foreign or domestic, whether created by the laws of New York, or the laws of any other State or government. The Court said:

> "It seems very plain that the purpose of the act of 1889, and of the amending act of 1890, was to regulate and define the corporate powers and priv-

ileges of domestic corporations only. They are acts conferring and regulating corporate capacity and privileges. * * * We are of the opinion that a statute of a State granting powers and privileges to corporations must, in the absence of plain indications to the contrary, be held to apply only to corporations created by the State and over which it has the power of visitation and control. Such is the natural interpretation of such legislation, in the absence of a contrary intention appearing on the face of the act. The legislature, in such cases is dealing with its own creations, whose rights and obligations it may limit, define and control."

(1893) Matter of Estate of Prime, 136 N. Y., 347, 59, 60.

In (1894) Vanderpoel *vs.* Gorman, 140 N. Y., 563–71, a New York statute provided that "No corporation shall make any transfer or assignments to any person whatever in contemplation of its insolvency, and every such assignment is declared void." It was claimed that foreign corporations were embraced in the general language of the prohibition but the court said they were not, and arrived at its opinion by reference to the whole act; and, from a perusal of the general provisions, the court thought it was clear that they were designed for the government and regulation of corporations created by that State. That the language was neither apt nor pertinent when applied to foreign corporations, but that it was both appropriate and pertinent when applied to domestic corporations.

In (1871) White *vs.* Howard, 46 N. Y., 144–65, a statute provided that "no devise to a corporation shall

be valid, unless such corporation by its charter or statute, be expressly authorized to take." It was contended that this law should be construed to include foreign corporations. The court said:

> "It is equally clear that such charters only were intended as were granted by a statute of this State, or organized under a general statute of the State, as it is that by the words 'by statute,' a statute of the State was intended. Any other construction would work a complete revolution of the policy of the State."

In (1894) Matter of Balleis, 144 N. Y., 132, the provision of the Transfer Tax Act exempting "any property hereafter devised or bequeathed * * * to any religious corporation" was held to apply only to domestic corporations of the character specified, and that it did not exempt religious corporations of other States.

In (1897) Whitcomb *vs.* Robbins, 69 Vt., 477, a statute was passed conferring the right of petition for insolvency upon corporations "created under the laws of the State." The quoted section was afterwards repealed. It was then contended that by the use of the word "corporation" unmodified that the right was thereby extended to foreign corporations. The court said:

> "We do not construe the law to confer benefits upon *foreign* corporations."

In (1892) Falls *vs.* U. S. Savings Asso., 97 Ala., 417, a statute provided that "No person, bank, corporation, or association of persons, *except building and loan associa-*

tions, shall demand or stipulate a greater rate of interest than ten per cent."

It was contended that foreign building and loan associations came within the exception. Held, that the exception referred only to domestic associations.

In (1876) Holbert *vs.* St. Louis R. R. Co., 45 Iowa, 23–6, a statute that "Any railroad corporation in this State heretofore organized under the laws of this State, or that may hereafter be organized, may take and hold * * * so much real estate as may be necessary for the location, construction, and convenient use of their road." A foreign corporation claimed that it was included in this statute by construction. The court said:

> "The right is conferred upon corporations organized under the laws of this State, and is, by necessary implication, denied to foreign corporations."

In (1889) South Yuba *vs.* Rosa, 80 Calif., 333, a statute providing that "every corporation now in existence" should file a copy of its charter in the office of the clerk where its property is located" was held to apply to domestic and not to foreign corporations.

In (1890) Rumbaugh *vs.* Improvement Co., 106 N. C., 461, a statute requiring "every contract of every corporation to be in writing" was held not to apply to foreign corporations.

In (1884) Hollis *vs.* Drew Theological Seminary, 95 New York, 166, the question was, whether the two months' limitation prohibiting bequests to "any corporation formed under this act" applied to a foreign corporation? It was held that it did not; (1) because the prohibition

was confined to bequests to corporations organized und er the act; and (2) that no public policy existed which required its extension to bequests to foreign corporations.

Sixth Error.

Section 669 of the Code, being inconsistent with Section 1023 and irreconcilable, the former is absolutely void.

These two sections were passed by Congress at the same time. The former confers upon domestic cemetery associations the right to take property for perpetual uses. The latter absolutely prohibits the raising of such estate for any perpetual purpose except for charity. The two statutes cannot stand together. If domestic cemetery associations are permitted to take property under Section 669, then both the letter and the spirit of Section 1023 are violated and an additional exception is placed in the statute, and that will permit something to be done that the statute has positively forbidden. Prohibiting statutes are not interpreted on a principle of leniency, and it is a well known rule of construction that where a general prohibitory statute is modified by an exception, that even that exception is construed strictly and extended to cover only such matters as its words will warrant.

The two sections cannot be harmonized, and the authorities on statutory construction say that where there is an irreconcilable conflict in different sections of a code or of parts of the same act, that the last in order of arrangement must prevail.

Sutherland's Statutory Construction, Sec. 268.

26 Am. & Eng. Ency. of Law, Sec. 619.

(1902) Hand *vs.* Stapleton, 135 Ala., 156-62.

At the time Sections 669 and 1023 were passed, another section intending to have a harmonizing effect upon these sections was also passed, viz:

> "SEC. 1624.—*Perpetuities.*—No will, testament, or codicil shall be effectual to create any interest in perpetuity, or make any limitation, or appoint any uses, except as permitted by this Code."

On June 30, 1902, six months after the Code went into effect, Section 1624 was repealed and stricken out by Congress in an Act to amend an Act entitled "An Act to establish a code of law for the District of Columbia." Thus it seems that Congress was aware of some inconsisterces on this subject when the Code was originally passed, but subsequently repealed the harmonizing section and thus intentionally left the other two sections in an antagonistic condition.

Seventh Error.

The will embodied one entire scheme composed of two interdependent parts: (a) The erection of a monument; (b) its care and preservation. If the latter is invalid, the former must fall with it.

Looking at the four corners of the will it is manifest that the testatrix had but one end in view, viz: that her whole estate should be expended in the Greenwood Cemetery, one-half going towards the erection of a monument at the grave of her husband and the other half to the preservation of the monument and the lot where it was to be located. (R., 5–6.) Just how important she considered these two bequests may be

judged from the fact that they were the first to receive her attention and the last to have her care. As they are so nearly identified and closely entwined, can the court say that they can be practically separated, and that even if one is found invalid, the other should be executed? The question arises had the testatrix known that the provisions for the preservation of the lot and monument were void, would she have directed the erection of the monument? She has so inherently combined them that they cannot be torn asunder without maiming the general frame of the will and thwarting the testatrix's substantial and dominant purpose.

The rule is that if some of the trusts embodied in a will are valid and some invalid, if they are so taken together as to constitute an entire scheme so that the presumed wishes of the testator would be defeated if one portion was retained and the other portions rejected, then all the trust must be construed together, and all must be held illegal and fall.

(1891) Tilden *vs.* Green, 130 N. Y., 29–50.
(1896) Lawrence *vs.* Smith, 163 Ill., 149–65.
(1895) *In re* Walkerly, 108 Calif., 627–44.
(1892) Matter of will of Butterfield, 133 N. Y., 473–6.
(1873) Holmes *vs.* Mead, 52 N. Y., 332–45.
(1872) Knox *vs.* Jones, 47 N. Y., 389–98.

It is respectfully submitted that the lower court should be reversed.

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